

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)
VS) CASE NO: 2:16-cr-94-2
DONALD McFARLAN)
MOTION HEARING

BEFORE: HONORABLE GEOFFREY W. CRAWFORD
CHIEF DISTRICT COURT JUDGE

APPEARANCES: ABIGAIL E. AVERBACH, ESQUIRE
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DATE: September 5, 2017

TRANSCRIBED BY: Anne Marie Henry, RPR
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1 (The Court opened at 1:30 p.m.)

2 THE CLERK: Your Honor, the matter before the
3 Court is criminal number 16-94-2, United States of America
4 versus Donald McFarlan. Present on behalf of the government
5 is Assistant United States Attorney Abigail Averbach. The
6 defendant is present with his attorney Kevin Henry. And we
7 are here on a motion to sever defendants for trial.

8 THE COURT: All right. Afternoon. Nice to see
9 all three of you.

10 MS. AVERBACH: Good afternoon.

11 MR. HENRY: Good afternoon.

12 THE COURT: I've had a chance to read everybody's
13 papers, twice as it happens, but why don't I turn things
14 over to Mr. Henry and hear from you on your motion and then
15 give the government a chance to respond.

16 MR. HENRY: Thank you, Your Honor. Is it your
17 preference that I use the podium?

18 THE COURT: Sure.

19 MR. HENRY: Your Honor, I would like to start with
20 a discussion of severance under Rule 8(b) because I frankly
21 think that that's the strongest basis for severance in this
22 case.

23 And, you know, the government seems to be taking
24 the position, and I think almost solely, that the basis for
25 joining the human trafficking claims with the drug claims is

1 the theory that the human or the drug claims somehow fuel
2 the human trafficking claims. As I understand it, that's
3 the essence of their position.

4 And there are several problems with that theory as
5 it relates to Rule 8(b). You know, first and foremost, I
6 think as a factual matter the problem with that position is
7 that the human trafficking allegations are alleged to have
8 begun long before the drug distribution claim conspiracy is
9 alleged to have begun.

10 So just as a factual matter, I don't see how the
11 government can articulate the theory that something, human
12 trafficking that occurred in 2012 was fueled by drug
13 distribution that occurred in 2015. But even if that were
14 true, and even accepting for sake of argument the notion
15 that these crimes can and do go hand in hand at times, under
16 Rule 8(b) that does not satisfy the government's
17 requirements because the indictment, and that is the, you
18 know, the document that we need to start from, because the
19 issue before the Court is whether these charges are properly
20 joined based on what's alleged in the indictment. I mean,
21 the case law is fairly clear on that.

22 And the indictment doesn't allege any such
23 relationship between the human trafficking claims and the
24 drug distribution claims. They, we simply have a conspiracy
25 to distribute narcotics and some individual counts and then,

1 then we have the human trafficking counts all by themselves
2 without any -- only against Mr. Folks and with no allegation
3 or no suggestion that they are somehow related.

4 So I think that's a problem that the government
5 has in this case, is that even if you were to believe or to
6 accept the theory that the, that the human trafficking was
7 fueled by the drugs, the government is bound by what is in
8 the indictment. And there is no, there is no allegation of
9 a common scheme there.

10 And the third problem with that theory, as it
11 relates to -- as being the basis for joinder, is that even
12 if it were true that Mr. Folks used drugs and withholding
13 drugs as a method of coercion, it's not necessarily that
14 those go hand in hand. I accept the case law that the
15 government cites for the proposition that, you know, feeding
16 an addiction and controlling supply is a method of coercion,
17 but it's not the only method of coercion under the human
18 trafficking statute. So it's not, even if it were accepted
19 that that's what Mr. Folks did, it's not necessarily that
20 those go hand in hand.

21 And I would point the Court to the Rajaratnam
22 decision, which I think does a nice job of distinguishing
23 the primary case that the government relies on here, which
24 is the Rittweger decision. And, you know, the key
25 distinction, as the Court in Rajaratnam points out, is that

1 there is no allegation in that case, there was no allegation
2 of the common scheme in the indictment. Whereas, in the
3 Second Circuit case, the Rittweger case, there were two
4 schemes alleged in the indictment. They were both schemes
5 to basically defraud investors. And they were slightly
6 different schemes, but they were alleged to have the same
7 common purpose, which was to defraud investors out of their
8 money into companies related in both schemes. So that
9 decision does a nice job of distinguishing the case. And I
10 think for the very same reasons this case doesn't fit into
11 the Rittweger fact pattern.

12 And the Court in Rajaratnam pointed out that, you
13 know, if joinder were to be allowed on the theory that the
14 government espouses here that, you know, the drugs fueled
15 the human trafficking, on the part of one defendant and one
16 defendant only, with no allegation that anybody else even
17 knew of the human trafficking, then any defendant would be
18 subject to being joined in a criminal case with another
19 defendant that, that had other allegations, unrelated
20 allegations pending against them. And that's just not the
21 law.

22 So under Rule 8(b) I think that the government is
23 bound by the allegations of the indictment that it brought
24 in this case. And the allegations in the indictment do not
25 allege any sort of common scheme as between the drug

1 distribution and the human trafficking.

2 And, further, --

3 THE COURT: But let me push back on that a little.
4 The indictment looks like most indictments, it's just a
5 skeletal recitation of the elements of the offense with the
6 names and dates and locations added in. It doesn't say
7 anything about motive or connection to other charges or, I
8 mean, it's not a narrative. It just puts you on notice of
9 the grand jury's determination that there's probable cause
10 to proceed.

11 MR. HENRY: Well, I would agree with that, Your
12 Honor, it does. But the problem with that as it relates to
13 Rule 8(b) is that the Court must make a decision on joinder
14 --

15 MS. AVERBACH: Right.

16 MR. HENRY: -- based on the indictment. And the
17 government certainly has a choice on how much information
18 they can put into an indictment. And I think it was the
19 Rajaratnam Court that made the statement that, you know, if
20 the Court or if the government wants to proceed on a
21 barebones indictment that it does so at its own risk.

22 And I think that's exactly the case here. If the
23 theory was that the human trafficking was fueled by the
24 drugs then that could have certainly been spelled in out in
25 the indictment, which it was not. So I think that's the

1 strongest reason for severance in this case. And I think
2 it's pretty clear on the facts and the law.

3 And the last point I would make about Rule 8(b)
4 is, you know, the government has likened this to comparing
5 two different conspiracies. And I'm not sure that's
6 actually wrong to do that, but it's worth noting that the
7 human trafficking claims are not a conspiracy. They are,
8 they are against Mr. Folks and Mr. Folks alone.

9 THE COURT: Right.

10 MR. HENRY: With no allegation in the indictment
11 that anybody else participated -- any of the other
12 co-defendants, certainly not Mr. McFarlan.

13 So, and the government also points out that, you
14 know, that some of the victims will be witnesses in the drug
15 conspiracy case and there's, there's some overlap in the
16 witnesses. But my response to that is, first of all, again,
17 we need to start with the indictment and not what the
18 witnesses will testify to. But the common overlap of
19 participants that Rule 8(b) contemplates I think pretty
20 clearly does not contemplate witnesses. It contemplates
21 co-defendants, actors, wrongdoers. So I don't think that
22 that's -- to the extent that there's any overlapping
23 witnesses between the two claims really has any bearing on
24 this analysis under Rule 8(b).

25 With respect to Rule 14, should the Court find

1 that the claims are properly joined, I think the strongest
2 argument for severance under Rule 14 is the spillover, which
3 is the second point we made and probably should have been
4 the first point because that is really the heart of why it
5 would be unfair to Mr. McFarlan to be joined in trial with
6 Mr. Folks on, with these counts still in place.

7 You know, there are plenty of cases in the Second
8 Circuit that acknowledge the fact that both in terms of the
9 volume of evidence and then the nature of the evidence, the
10 joinder can lead to unfair prejudice.

11 And here I think we would have both. We would
12 have the jury sitting here for a long period of time
13 listening to some very horrific allegations and evidence of
14 human trafficking as against Mr. Folks only. It would not
15 be admissible against Mr. McFarlan.

16 And not only would there, would I think that that
17 testimony probably would be great, you know, that evidence
18 would be greater in quantity than the drug conspiracy
19 evidence. But it also has the effect of poisoning, in the
20 jury's mind, Mr. McFarlan. To, if, you know, the jurors
21 being human as they are, to be -- to hear that evidence
22 against one co-defendant it would be very difficult, in my
23 view, if not impossible, for the jury to segregate in their
24 mind the fact that Mr. McFarlan has not been alleged to have
25 been involved in this at all.

1 And so I think that that's the strongest argument.
2 And there are plenty of cases that we cited in our papers
3 that acknowledge that, those factors as a basis to sever
4 under Rule 14.

5 And then with respect to the, to the efficiency
6 argument raised by the government, again, we acknowledge
7 that that, that that's an important consideration for the
8 Court under Rule 14. But not so important, certainly, it's
9 not an issue under Rule 8(b). I think 8(b) stands on its
10 own and the counts are either properly joined or they are
11 not without regard to whether it's more efficient to try the
12 case together. But even under Rule 14 where efficiency
13 comes into play, efficiency has its limits.

14 And, of course, you know, the, it would be
15 improper for the government to try somebody for the sake of
16 efficiency to the point that it erodes a defendant's right
17 to a fair trial, which we think would happen here.

18 And, you know, if the government were forced to
19 try two cases, one against Mr. McFarlan and one against
20 Mr. Folks, I don't think that that's, you know, so
21 inefficient to cause the government any undue burden here.

22 The case against Mr. McFarlan is relatively
23 narrow. He is charged in the conspiracy, but the individual
24 or the substantive counts against him relate to basically a
25 couple of weeks time; a controlled buy and a possession

1 count.

2 So I think Mr. McFarlan's involvement in the
3 conspiracy was, if the government can prove a conspiracy,
4 it's relatively short. It's a much shorter case than the
5 case against Mr. Folks. So I don't see much to be gained in
6 the sake of efficiency for trying these cases together,
7 especially when you consider the prejudice to Mr. McFarlan
8 trying the cases together.

9 THE COURT: What does the picture look like if you
10 exclude from consideration the trafficking counts that
11 precede the drug distribution conspiracy and had it only
12 been brought with the counts against your client for
13 conspiracy and distribution and possession, and against a
14 co-conspirator adding in the counts of trafficking, but all
15 from the same timeframe, would you make the same arguments
16 or would your case be weaker?

17 MR. HENRY: I would make primarily the same
18 arguments. And the primary argument that I would rely on is
19 the fact that there is still no common scheme alleged.
20 There are two silos of charges without any allegation of
21 overlap between the two except for the government's theory
22 that they've articulated in their papers.

23 But, again, that's not the way Rule 8(b) works, as
24 I understand it. I think the Court shouldn't consider what
25 the government will argue at trial. It should look at the

1 superceding indictment or the second superceding indictment
2 in this case and look to see if there's any, any common
3 scheme alleged.

4 And there clearly isn't in this case. And to the
5 extent that the common scheme is to, you know, is to
6 illegally obtain profits, you know, I think the same could
7 be said for any crime. So it has to be more than that.

8 And so, it would, it would, it, you know, it would
9 change the argument a little bit, but at the end of the day
10 the principal argument stands the same.

11 THE COURT: Okay. We haven't talked about the
12 confrontation clause issue, which is one that worries me
13 probably more than the others. But why don't I hear from
14 the government on that issue and then give you a chance to
15 respond.

16 MR. HENRY: Okay.

17 THE COURT: Because they know more really about
18 these statements than you and I do.

19 MR. HENRY: Right. Thank you.

20 THE COURT: Okay.

21 MS. AVERBACH: Thank you, Your Honor. You just
22 want to hear me briefly on the Bruton issue or on
23 everything?

24 THE COURT: On everything. But I wanted to make
25 certain that I understand the confrontation clause. That's

1 the one that will get it sent back.

2 MS. AVERBACH: Let me start with that. That's the
3 easiest. I view it as unlikely that we would use Folks'
4 post-arrest statement as part of our evidence, although I
5 want to reserve the right to do it. So I don't want to make
6 any final decisions as to the government's evidence now.

7 THE COURT: Right.

8 MS. AVERBACH: But I can tell you I think it's
9 unlikely. It's largely not particularly helpful to our
10 case.

11 THE COURT: It usually isn't.

12 MS. AVERBACH: Pardon?

13 THE COURT: It often isn't.

14 MS. AVERBACH: Right. To the degree that there
15 are helpful portions, and we view it as important to get
16 those in --

17 THE COURT: Right.

18 MS. AVERBACH: I do think that the statement could
19 be redacted to excise the portions where there are Bruton
20 issues because they are discreet parts of the statement.
21 And certainly the Court could issue limiting instructions.

22 THE COURT: Those haven't been met with much
23 affection by the Supreme Court.

24 MS. AVERBACH: You know, there's also the
25 possibility of having two juries impaneled. I have, I think

1 that's such a --

2 THE COURT: That one sounds like --

3 MS. AVERBACH: -- gymnastic event.

4 THE COURT: Yeah. That would be a nightmare.
5 Right.

6 MS. AVERBACH: You know, I do think that the issue
7 is premature, but I can tell you that there is very little
8 evidentiary value, from the government's perspective in
9 Folks' post-arrest statement.

10 I mean I, --

11 THE COURT: All right. It's not premature in one
12 sense that if one of several remedies for the Bruton problem
13 is severance, probably the most drastic.

14 MS. AVERBACH: True.

15 THE COURT: But that has to be made now. That
16 isn't really available to me at trial.

17 MS. AVERBACH: No. But there will come a point
18 where we have, you know, zeroed in on the evidence that we
19 will use a month or two months ahead of whatever trial date
20 Your Honor sets. And at that point we will have a very
21 clear view of the evidence. We are using the evidence. We
22 are not using -- or the evidence we are manipulating to use
23 in a way that accommodates the needs of every defendant at
24 the table.

25 THE COURT: I looked at Rule 14, the second

1 section, which anticipates and sort of invites an in-camera
2 review, which I don't mind doing in any case, you know,
3 there's really never that much stuff, once you get into it
4 you can get through it. I worry about having enough sort of
5 traction and context on the case to really understand the
6 significance of what I'm looking at.

7 MS. AVERBACH: I recently watched it. I can
8 paraphrase it for you. He denies being a drug trafficker.
9 He says that he's sort of the muscle or the enforcer because
10 his reputation on the street is so significant that he's,
11 you know, able to achieve results undeveloped, nondescript
12 results without, you know, doing much more than relying on
13 his reputation.

14 THE COURT: Right.

15 MS. AVERBACH: And he does know Donald McFarlan,
16 McFarlan rather, and that he knows him to bring drugs up
17 from New York City to Vermont.

18 THE COURT: And then what was the last thing?

19 MS. AVERBACH: The rest of it is just denials.

20 THE COURT: Right.

21 MS. AVERBACH: Never trafficked in humans, you
22 know.

23 THE COURT: The part in which he, that he puts his
24 hand on Mr. McFarlan about is what exactly?

25 MS. AVERBACH: He does, he does point the finger

1 at Mr. McFarlan as a drug courier, somebody who brings drugs
2 up from New York to Vermont. And, frankly, in the
3 government's view, that's probably accurate. We do believe
4 that's accurate.

5 THE COURT: Right. But probably not admissible.

6 MS. AVERBACH: But that may be the only accurate
7 part of his post-arrest statement.

8 THE COURT: Right. And that could be excised for
9 Crawford reasons?

10 MS. AVERBACH: It sure could.

11 THE COURT: Okay. That's helpful. Thank you.

12 MS. AVERBACH: Sure. So, you know, as I looked at
13 it I thought the Rule 14 argument was stronger than the 8(b)
14 argument, but I'll take up the 8(b) argument because counsel
15 did a good job of arguing that point. But as I read the
16 law, the case law joinder is proper when you have, one,
17 substantial identity of facts and participants or, two, a
18 common scheme or plan. And in this case we have both. We
19 have identity of facts and participants with respect to not
20 only the people who are charged and uncharged committing the
21 crimes and they are present for the crimes, but also of
22 victims and witnesses.

23 So to put that into concrete terms of victims of
24 the human trafficking counts are also the baggers in the
25 drug conspiracy. The couriers in the drug conspiracy are

1 also --

2 THE COURT: What I call the gophers.

3 MS. AVERBACH: The gophers?

4 THE COURT: Right.

5 MS. AVERBACH: Gopher is not the right word.

6 Couriers means the people who transport drugs --

7 THE COURT: Right.

8 MS. AVERBACH: -- interstate. It's a more
9 important job --

10 THE COURT: Okay.

11 MS. AVERBACH: -- than the go to guy for McDonalds
12 or the runner even whose, who does the hand to hand.

13 THE COURT: Okay.

14 MS. AVERBACH: Okay. So the government believes
15 that Mr. McFarlan is a courier and really the second in
16 charge of the drug conspiracy under Brian Folks.

17 And there were others involved who were uncharged.
18 And the conspiracy as charged in the indictment refers to
19 others named and unnamed. Obviously, Mandy Latulippe was
20 also charged with being a part of the conspiracy. But the
21 people who are charged, McFarlan, and uncharged in the
22 conspiracy, who were men, were also serviced sexually by the
23 victims of human trafficking. That was part of the
24 expectation of Brian Folks.

25 And one of the ways that he was able to

1 continually demean, demoralize, degrade, dominate,
2 disorient, all the D. words that go into what coercion is in
3 this world, in this landscape. Another very illustrative
4 example is there is an uncharged bagging up party. A
5 bagging up party is when, you know, there's a substantial
6 amount of narcotics that needs to be packaged for individual
7 sale.

8 In this case Donald McFarlan was there, Brian
9 Folks was there, and a number of different women who were
10 part of the drug and human trafficking businesses. And
11 those witnesses will be able to articulate what they were
12 doing there and why they were doing it and how they were
13 controlled into doing such a thing.

14 One of the things that Brian Folks insisted on is
15 that these women as they bagged up were naked and they only
16 wore aprons. And that was because he wanted to make sure
17 they couldn't steal from him, his drugs. But it was also
18 because every time he could degrade any one of these girls
19 he gained one more aspect of control over them, over their
20 behavior.

21 And so the drugs played a very coercive role
22 inasmuch as they were withheld from the girls in order to
23 force the commercial sex act, but in also various ways that
24 are far more subtle.

25 THE COURT: So what do you say to Mr. Henry's

1 point, for which he has case law support, that in making the
2 Rule 8 decision, I don't do what you invited me to do, which
3 is kind of go listen to something like an opening statement
4 and draw my conclusions about what the evidence might well
5 be, but instead I decide that question within the limits of
6 the indictment itself and not sort of hear a forecast of
7 what the trial is going to look like?

8 MS. AVERBACH: Well, I do believe, and Mr. Henry
9 sets this out in his papers, that this is not a settled
10 question in the Second Circuit. The case that he was
11 describing to you, Rajaratnam, is a Southern District case.
12 So it's not binding upon this Court.

13 That Court drops a footnote in footnote two sets
14 out 11th Circuit, the Third Circuit, the D.C. Circuit all,
15 and perhaps others, all rely on representations by the
16 prosecutor, other moving papers that contain factual
17 assertions about the case and that that's proper. So this
18 is an unsettled question in the Second Circuit.

19 I would argue that it's in, it makes sense to do
20 it that way so that in the end of the day when you are
21 charged with making a decision as to whether evidence of one
22 is going to be evidence of the other, which is one of the
23 analyses this Court should undertake, you make an informed
24 decision about whether or not that's true. Because
25 especially if you're in the Rule 14 landscape you have

1 tremendous discretion which won't be overturned by the Court
2 of Appeals unless there's been, you know, a gross
3 miscarriage of justice --

4 THE COURT: Right.

5 MS. AVERBACH: -- for example.

6 So, frankly, I think the more informed your
7 decision can be the better decision you make with respect to
8 these kinds of things.

9 Rule 8(b) requires that Your Honor determine
10 whether the commission of one offense depends on or lead to
11 the commission of the other. And that's what we have here.
12 Brian Folks was selling drugs for years before the dates of
13 the drug conspiracy as charged in the indictment and up
14 until the point where he was arrested. He also sold women
15 during all of those times and even prior to the dates
16 charged in the indictment with respect to the drug
17 conspiracy, but not before he was selling drugs.

18 So his ability to sell drugs, his ability to
19 engage in the conspiracy to sell drugs, enabled his ability
20 to traffic girls. I mean, the drugs acted as how he enticed
21 them, how he lured them in. We not only charged coercion we
22 charged fraud as a theory.

23 And one of the theories of fraud is that he
24 offered really vulnerable people the promise, the false
25 promise, of a good life, a safe life, clothes, food, shoes,

1 and shelter. But those things came with strings that, you
2 know, became apparent over not very much time. And as Folks
3 was able to, Folks and his co-conspirators were able to
4 further the addictions of their drug customers Folks was
5 able to exploit these really vulnerable people by
6 withholding the drugs and saying you can't have the
7 substance your body so desperately needs until you perform
8 this commercial sex act. And then the drugs of the
9 conspiracy sold were also used as punishment for the
10 trafficked victims when they didn't do as they were told or
11 as a reward for when they did.

12 So it was really the currency of the human
13 trafficking crimes fueled by the drug conspiracy. So the
14 customers of the drug conspiracy were all over, but also the
15 human trafficking victims. So each one of the human
16 trafficking victims is going to be able to testify as to
17 what happened to her and how it happened. And as she
18 testifies to that she will automatically give testimony
19 about the drug conspiracy.

20 And in order to sort of separate that testimony
21 out one from the other, the, I mean, it's almost impossible
22 because you wouldn't have any frame of reference. You
23 wouldn't understand why she made the decisions she did and
24 why the facts, you know, unfolded as they did without
25 understanding that she was also a victim of sex trafficking

1 and vice versa. You wouldn't understand the sex trafficking
2 if you didn't understand the drug conspiracy. One really
3 depends on the other.

4 THE COURT: You would try them separately, it
5 would just be two trials that lasted a pretty long time and
6 had a lot of overlapping evidence?

7 MS. AVERBACH: Well, and that's the point.
8 Because it's the proof of the human trafficking, whether or
9 not Mr. McFarlan is charged with it, is admissible against
10 him because it's proof of the drug conspiracy. So if Your
11 Honor were to sever the defendants, the co-defendants one
12 from the other, and we would end up with two trials, but the
13 evidence would be almost identical. I mean, it would be to
14 no end because most of the human trafficking evidence is
15 admissible against Mr. McFarlan as proof of the conspiracy.

16 THE COURT: Okay. That's helpful. Thank you.

17 MS. AVERBACH: I would just highlight for Your
18 Honor --

19 THE COURT: How do you see the Rule 14 issues?

20 MS. AVERBACH: Pardon?

21 THE COURT: How do you see the Rule 14 issues?

22 MS. AVERBACH: Yeah. I just wanted to highlight
23 one more thing, if that's okay.

24 THE COURT: Yes, of course.

25 MS. AVERBACH: The courts say over and over again

1 that there's a preference of joint trials of co-defendants
2 under 8(b). And that's particularly strong where there is a
3 common scheme or plan alleged. That's what we have here.
4 Really the standard is what a reasonable person would
5 recognize as a common factual element. And given that human
6 trafficking is a relatively new crime under federal law, the
7 Trafficking and Victims Protection Act hasn't been around
8 for that long. But I think there's enough discussion about
9 it now that courts, reasonable people can see a drug count
10 and human trafficking count side-by-side and infer that
11 there is reasonable overlap between those two things.

12 So the Rule 14 issue is an altogether separate
13 inquiry, as courts have said. And that requires a
14 determination as to whether or not there is substantial
15 prejudice, not just prejudice, but substantial prejudice.
16 Because Rule 8(b) allows for some prejudice Rule 14 guards
17 against substantial prejudice.

18 And if there is, this Court has three options,
19 more than three really. But first is to order separate
20 trials. The second is to sever the defendants. And the
21 third is to provide any other relief that justice requires.

22 So that, this kind of substantial prejudice only
23 exists when there's a serious risk that a joint trial will
24 compromise a specific trial right or prevent the jury from
25 making a reliable judgment regarding guilt or innocence.

1 As we've talked about with 8(b), the evidence is
2 admissible -- evidence that is admissible against one but
3 not the other does not necessarily require severance because
4 Your Honor can issue limiting instructions. But in order to
5 guard against the spillover effect, which I think is sort of
6 the strongest concern here.

7 THE COURT: Right.

8 MS. AVERBACH: The one we ought to be most careful
9 about, limiting instructions throughout the trial, where the
10 Court instructs jurors to consider evidence only against
11 each defendant individually as to each count is proper.

12 And that happens in cases of this nature where one
13 person is charged in a conspiracy that's something like a
14 narcotics conspiracy or a gun conspiracy and other
15 defendants are charged with the murders, the violence, the
16 assaults.

17 The one particular case I'm thinking of out of the
18 Southern District murder, potentially torture and assault,
19 were sort of the other cases that they were worried about
20 this prejudicial emotional spillover about.

21 THE COURT: Right.

22 MS. AVERBACH: In that case they said if the proof
23 is admissible also as proof of the conspiracy the proper
24 recourse and an acceptable recourse is a limiting
25 instruction throughout because uncharged acts may be

1 admissible as direct evidence of the conspiracy. And that's
2 what I was trying to articulate about 8(b), that even if
3 Your Honor were to sever -- even if you found that the
4 joinder was proper under 8(b) but severed under Rule 14, the
5 effect would be not great because the so-called charged
6 evidence of the sex trafficking would be admissible in a
7 trial against Donald McFarlan for conspiracy.

8 THE COURT: Right. Presumably those counts, the
9 conduct relating to time before that started the conspiracy,
10 that would drop out?

11 MS. AVERBACH: Yes. Yes.

12 THE COURT: But you would be offering the rest of
13 it anyway?

14 MS. AVERBACH: There's either equal or more
15 overlap than not with respect to the timeframe.

16 THE COURT: At least half, right?

17 MS. AVERBACH: Yeah. And so, you know, as the
18 human trafficking victims are all housed in one place, which
19 was also the stash house for the drugs.

20 THE COURT: Right.

21 MS. AVERBACH: So, you know, the description of
22 what was going on there, and who was there with respect to
23 Mr. McFarlan and Folks and who the players were and what the
24 rules were, all of those things will come out in a case
25 against McFarlan alone. So, you know, severing under Rule

1 14 has no, has no effect really if that evidence is
2 otherwise admissible.

3 So the risk -- I would say also that the risk of
4 the emotional prejudice that we are concerned about with
5 respect to the sex trafficking, that is real. I mean, the
6 nature of this evidence is disturbing.

7 And you can't disentangle it from the drugs
8 because really the drugs are part of, part of the way
9 everybody gets through this kind of disturbing traumatic
10 stuff by, you know, the anesthesia of the opiate.

11 But in this day and age of the Vermont opiate
12 epidemic I would submit that every single person who comes
13 into this courtroom as a prospective juror at this point,
14 unfortunately, is probably going to know somebody of a
15 family member, a cousin, a friend, a son, a daughter, an
16 aunt who has an addiction to opiates or has known somebody
17 who has overdosed from opiates.

18 And I don't think we can say any more that trying
19 a drug case of this magnitude with the fallout that it has
20 had when you see the witnesses up on the stand whose hair is
21 coming out, you know, that's, just that visual situation is
22 going to be extremely upsetting for people. And that's just
23 the drug case.

24 So I, you know, there will be upsetting evidence
25 from the drug case as well as the human trafficking case.

1 So I don't think that you can, you can separate one from the
2 other and say one is more horrible than the other or more
3 upsetting. But we do rely on jurors to follow instructions.
4 We do choose them hopefully with a lot of vetting with
5 respect to their ability to follow the law and follow Your
6 Honor's instructions. And we do hope and expect that they
7 will do that.

8 As to the charge that the volume of evidence is
9 greater in the human trafficking case because it lasts
10 longer, I don't actually think that that's true. There's a
11 tremendous amount of drug conspiracy evidence that comes
12 from a series of controlled buys which have video and audio
13 wires, and controlled -- well, confidential informants doing
14 transactions. There's a lot of surveillance. There's
15 actual drugs. There's a firearm that's still uncharged in
16 the case. There's a tremendous number of witnesses, law
17 enforcement and lay, who will testify as to the drug
18 conspiracy. And there's digital evidence as well. We did
19 search warrants on devices that were recovered from Folks
20 when he was arrested and his home. And those devices gave
21 evidence of the drug conspiracy and the human trafficking
22 counts.

23 So as you go through Brian Folks' computer you can
24 see pictures of Donald McFarlan. And those are interspersed
25 with folders of women and what he has collected as part of

1 his commercial sex scheme which are a variety of different
2 things, but some of them are live sex acts that Brian Folks
3 participated in and was able to get the girls to participate
4 in. And sometimes Donald McFarlan is in those videos.
5 Sometimes it's just Brian Folks.

6 So you cannot -- separating the sex from the drugs
7 with respect to McFarlan would be almost an impossibility
8 with respect to the physical evidence as well because some
9 of the strongest evidence that we have digitally from Folks'
10 computer intermingles those two things.

11 Counsel also raised, but didn't touch on today,
12 the concern about speedy trial. I think that that's
13 statutorily provided for where reasonable periods of delay
14 from joinder are excluded.

15 And, finally, the scope of the trials and judicial
16 economy, certainly the evidence is, the quantity of evidence
17 is less with respect to Mr. McFarlan than it is with respect
18 to Mr. Folks. But the nature of the proof of the conspiracy
19 is time consuming. And so trying Mr. McFarlan alone would
20 be a significant trial in and of itself and then trying
21 Brian Folks alone would be another significant trial.

22 I don't believe that any potential spillover
23 effect couldn't be cured with instructions from this Court.
24 I don't believe that it's the kind of prejudice, substantial
25 prejudice that requires forcing these witnesses to relive

1 these experiences twice publicly. It's going to be hard
2 enough to get them to do it once. For them, for their own
3 sakes I don't think this is a case that severance is
4 warranted.

5 THE COURT: All right. Thank you. Mr. Henry?

6 MR. HENRY: Yeah, I would just like to address a
7 couple points raised, Your Honor. First, with the issue of
8 the Rule 8 analysis being settled law, I do agree that the
9 Second Circuit hasn't expressly adopted the notion that this
10 decision has to be made on the indictment alone. But as we
11 point out in a footnote in our papers, there's a recent
12 unpublished Second Circuit opinion. Rittweger didn't,
13 didn't decide the issue, but suggested that that was the
14 case. And a more recent Second Circuit has suggested that
15 that is the Circuit's view anyway. And I, and I believe
16 that, you know, that that's what the Second Circuit will
17 ultimately hold.

18 With respect to the genesis argument, you know, I
19 use the word genesis because the Eighth Circuit used it in a
20 case that I think is very similar and addresses a very
21 similar argument here which is, as I understand the
22 government's position, being that the drug distributions are
23 the genesis for the human trafficking. And in an Eighth
24 Circuit case, Sazenski, that we cite in our papers, I just
25 want to read to the Court one passage from the case that I

1 think is right on point here.

2 There the Court says, the government argues that
3 there's a sufficient connection between a defendant's
4 offenses because the cocaine, the cocaine dealings, which
5 had occurred prior, provided the genesis of the marijuana
6 operation which came subsequently. And because the same
7 informant was involved in both the cocaine and marijuana
8 transactions, we must disagree. The former argument is
9 irrelevant. It fails to address how McDonald was connected
10 to the cocaine dealing.

11 And that's the problem here, Your Honor, which is
12 to the extent that the human trafficking claims and the drug
13 distribution claims are somehow connected, they are so only
14 as it relates to Mr. Folks. There is, there is no
15 allegation that Mr. McFarlan participated or that the
16 allegations of drug distributions against Mr. McFarlan are
17 somehow connected to the human trafficking because there's
18 no claim against Mr. McFarlan.

19 And I think, you know, ultimately that's the
20 problem with the government's theory here, is that even if
21 it were to be accepted that there's a connection, that
22 connection only relates to Mr. Folks whose the only one who
23 is alleged to have participated in the human trafficking.

24 So, and the other point I would like to make, Your
25 Honor, is, I mean, I disagree with the government that a lot

1 of the human trafficking evidence comes into a trial if Mr.
2 McFarlan is tried by himself as it relates to the drug
3 conspiracy. There may be some overlap in that testimony to
4 the extent that these, that the victims of the human
5 trafficking were also workers and/or customers of the drug
6 conspiracy. But I don't think the Court is going to permit
7 a lot of testimony about the horrors that they suffered at
8 the hands of Mr. Folks as it relates to being forced into
9 commercial sex acts if Mr. McFarlan is tried alone. So I
10 would disagree that there's a lot of overlap.

11 So I think that under the Rule 14 analysis, you
12 know, I think that there's considerable risk of undue
13 prejudices here to Mr. McFarlan. And, you know, I do agree
14 with the government in the characterization of this evidence
15 and would suggest that that would be extremely difficult for
16 a rational juror to segregate his or her mind based on a
17 curative jury instruction.

18 THE COURT: All right. Thank you both. I'll take
19 it under advisement. You've both given me things to think
20 about. And I'll get something out by the end of the week.
21 Appreciate it. Thanks.

22 MR. HENRY: Thank you.

23 MS. AVERBACH: Thank you, Your Honor.

24 (The Court recessed at 2:15 p.m.)
25

C E R T I F I C A T E

I, Anne Marie Henry, Official Court Reporter for the United States District Court, for the District of Vermont, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

A handwritten signature in black ink that reads "Anne Marie Henry". The signature is written in a cursive style and is positioned above a horizontal line.

Anne Marie Henry, RPR
Official Court Reporter